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LEGAL IMPLICATIONS OF TREATING FOREIGN PATIENTS: A REVIEW OF MALPRACTICE COVERAGE FOR CANADIAN DENTISTS

Many of Canada's major population centres are within 160 kilometres of the United States border[1] and as a result, many Canadian dentists treat patients who are residents of the United States. However, there are legal implications that arise when a Canadian dentist treats a U.S. (foreign) patient.

Dentists in Canada obtain malpractice insurance either by way of mandatory inclusion in their annual fee for their certificate to practice (Ontario and Quebec) or by paying an additional premium to an outside insurer (i.e. CDSPI). In Ontario, part of the annual fee payable to the Royal College of Dental Surgeons of Ontario includes a fee for mandatory malpractice insurance coverage under the auspices of the Professional Liability Program (PLP).

However, the malpractice coverage provided under the PLP policy in Ontario and the CDSPI malpractice policy may have gaps in coverage. Both these policies may not fully protect Canadian dentists from U.S. or other foreign residents who elect to initiate legal proceedings against them outside of Canada.

CAUSE FOR CONCERN

As a result of dissatisfaction with treatment rendered by a Canadian dentist to a U.S. patient, the patient could elect to bring forth a claim in Canada or to commence it where they normally reside, in the United States. If the patient elects to sue in the United States, there is a greater potential for a higher damages award. Also, substantially increased expenses would be incurred in order to defend any claim in the United States.[2]

For Canadian physicians, the Canadian Medical Protective Association (CMPA), which is the "insurer" for most Canadian physicians, has in some cases declined to extend coverage to its members who have found themselves faced with a U.S. claim.[3]

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1 Government of Canada, Building a Border for the 21st Century, www.canadianembassy.org/border, Feb. 9, 2005

2 Royal College of Dental Surgeons of Ontario, PLP Bulletin: Advice About Treating Patients Who Are Not Ontario Residents, Dispatch, July/August 2003; 25

3 Gray, J. and Crolla, D., CMPA Assistance in Legal Matters Initiated by Non-Residents of Canada, CMPA Revised Policy, June 2003

As a result, these physicians were on their own, with no insurance coverage. The concern for Canadian dentists is that they could find themselves in a similar situation if they are faced with a claim brought outside of Canada.

PLP AND CDSPI POSITION

The PLP published a Bulletin in the July/August 2003 issue of Dispatch in which they addressed the treatment of patients who are not Ontario residents. In the Bulletin, the PLP states:[4]

> *If you are sued by a U.S. resident in U.S. courts for professional services provided in Ontario, you will be afforded coverage under your policy in the absence of any other policy violations.*

At first glance this appears to suggest that Ontario dentists need not take any further action with regards to the treatment of non-Ontario patients. In their malpractice information sheet,[5] the CDSPI states that their policy only covers actions brought in Canada:

> *The insurer is only liable for actions brought in Canada to recover for such acts or omissions.*

PLP AND CDSPI CONSENT AGREEMENTS

The PLP (Fig.1) and the CDSPI (Fig.2) have developed agreements that are generally referred to as "Governing Law & Jurisdiction Agreements"or "Consent to Treatment". Basically, these agreements state that the patient agrees, prior to any treatment being rendered, that the laws of Ontario (or another Province) will govern and that any and all claims will be brought in the courts of Ontario (or another Province). While obtaining the signature of a U.S. patient on one of these agreements is very good practice, these agreements do not go far enough and may not provide sufficient protection in all circumstances. These agreements may be lacking in the following regards:

- The wording may not be strong enough to ensure that in any dispute over the legal jurisdiction, the jurisdiction of the Canadian court will prevail over any claim to jurisdiction by a U.S. court.
- The agreement only pertains to the relationship between that one patient and that one dentist who are parties to the agreement and does not adequately protect a dentist as part of a "team", some of whose members are located in other (i.e. U.S.) jurisdictions.

In addition, there exist several legal principles, in addition to those contemplated by the standard PLP and CDSPI agreements that may

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4 Supra note 2 at 24

5 CDSPI, Malpractice Information Sheet, www.cdspi.com, Feb. 9. 2005

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impact on the "coverage" that a Canadian dentist has when they treat U.S. patients. Therefore, any dentist who routinely treats these same patients should carefully consider the following factors and implement the suggested recommendations where appropriate, prior to embarking on the treatment of these same patients.

FACTORS TO CONSIDER WHEN TREATING U.S. PATIENTS

Malpractice Insurance Policy Limits

The basic malpractice coverage for a dentist in Ontario under the PLP policy is $2 million. Excess coverage can be purchased through the PLP policy in additional amounts (up to $8 million in additional insurance is available), thus

CONSENT TO TREATMENT

In order for a valid consent to treatment to be given, several requirements must be met, both as to the ability of the patient to consent and as to the nature of the information provided. In some provinces and territories, these requirements have been codified in legislation.[1] However, the law applicable to informed consent is governed by the same general principles in all Canadian jurisdictions.

Ability of Patient to Consent

Legal Capacity

The patient must have the legal ability to consent to treatment. Most dental patients will have this capacity. The exceptions are:

- people who have been declared incompetent, in which case their guardian, or substitute decision maker, must provide the consent, and
- minors who are below the age of consent for that province or territory, as set out below, in which case their parent or guardian must provide the consent.

The age of consent for medical treatment varies from province to province. In New Brunswick, a person 16 or older may consent to medical treatment. A younger person may consent if the attending medical practitioner believes he/she is capable of understanding the nature and consequences of treatment, and if the treatment and the procedure to be used are in the minor's best interests for continued health and well-being. In Quebec the age of consent is 14 if the treatment is required because of the patient's state of health, but a parent's or guardian's consent is required if the treatment is not required by the patient's state of health and it entails a serious risk for his/her health or it may cause grave or permanent illness. In most other provinces the common law applies. This means that a minor can consent if he/she is capable of understanding the information about a treatment and appreciating the risks and likely consequences of that treatment. If you are not sure what the age of consent is in your jurisdiction, you should contact your licensing body.

Mental Capacity

The patient must have the mental capacity to give the consent. This means that he/she must have the ability to understand the information about the treatment and understand the likely consequences of the treatment. If a patient does not understand English, an interpreter should be used. In Ontario, the *Health Care Consent Act, 1996* provides that a person is presumed to be capable with respect to treatment decisions unless the physician or dentist has reasonable grounds to believe otherwise.

[1] *[legislation Act (Nova Scotia), Infants Act (Prince Edward Island), Health Care (Consent) and Care Facility (Admission) Act (B.C.), Health Care Consent Act, 1996 (Ontario), Quebec Civil Code]*

If a patient lacks either the required legal or mental capacity, a substitute decision maker legally authorized to provide consent on behalf of the patient may consent on his/her behalf. Most provinces now have legislation dealing with substitute decision makers and the signing of health care directives.

Voluntary

The consent to treatment must be given voluntarily and cannot be coerced or obtained through fraud or misrepresentation.

Consent to Treatment

Information Provided

The patient must give an **informed** consent to the treatment. This means that you must provide them with the information about:

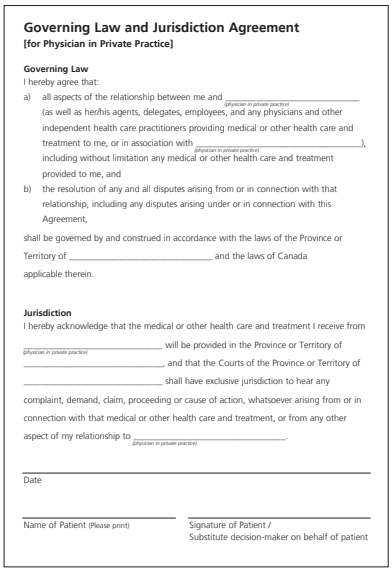
- the treatment and its benefits
- the material risks and side effects of the treatment
- any reasonable alternatives to the treatment, and
- the consequences of not having the treatment that any reasonable person in the same circumstances would want to have.

The Supreme Court of Canada has held that the patient should be advised of all probable risks that might cause serious injury or death. A dentist or physician will not be found negligent in failing to advise a patient of a risk of treatment if the court accepts that the average person in the patient's position would have consented even if they had been aware of the risks. Remote risks do not have to be disclosed to the patient, unless the patient specifically asks about such risks. In deciding whether a reasonable patient would proceed despite the risks, the courts will consider how necessary the treatment was. A patient whose life is at stake is more likely to accept a small risk of serious harm than a patient undergoing a treatment which is elective. It is therefore particularly important to provide full information about possible negative consequences to a patient who is consenting to elective treatment.

In determining whether the patient has been provided with appropriate information, courts will consider what the general practice is among other dentists. In Carter v. Ngaidu, the patient suffered a fractured jaw while having her wisdom teeth extracted. She had not been warned prior to the surgery of the risk of a fractured jaw. The court found that it was the standard practice among dentists in Calgary in 1986 not to warn patients of the rare possibility of a jaw fracture, and accordingly found that the dentist had not been negligent in failing to warn the patient. Similarly, in

FIGURE 1

PLP Governing Law & Jurisdiction Agreement, Royal College of Dental Surgeons ofOntario, PLP Bulletin: Advice About Treating Patients Who Are Not Ontario Residents, Dispatch, July/August 2003.



Governing Law and Jurisdiction Agreement
[for Physician in Private Practice]

Governing Law

I hereby agree that:

a) all aspects of the relationship between me and _____ (physician in private practice) (as well as her/his agents, delegates, employees, and any physicians and other independent health care practitioners providing medical or other health care and treatment to me, or in association with _____ (physician in private practice)), including without limitation any medical or other health care and treatment provided to me, and

b) the resolution of any and all disputes arising from or in connection with that relationship, including any disputes arising under or in connection with this Agreement,

shall be governed by and construed in accordance with the laws of the Province or Territory of _____ and the laws of Canada applicable therein.

Jurisdiction

I hereby acknowledge that the medical or other health care and treatment I receive from _____ (physician in private practice) will be provided in the Province or Territory of _____, and that the Courts of the Province or Territory of _____ shall have exclusive jurisdiction to hear any complaint, demand, claim, proceeding or cause of action, whatsoever arising from or in connection with that medical or other health care and treatment, or from any other aspect of my relationship to _____ (physician in private practice).

_____
Date

_____ _____
Name of Patient (Please print) Signature of Patient / Substitute decision-maker on behalf of patient

FIGURE 2

CDSPI Consent to Treatment. CDSPI Consent to Treatment Sheet, www.cdspi.com

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enabling an Ontario dentist to have a maximum of $10 million of malpractice insurance coverage. For dentists outside Ontario (and Quebec), basic coverage under the CDSPI policy starts at $3 million and excess coverage can be purchased for up to $25 million in total.

> *While the PLP policy would not pay punitive damages in a lawsuit brought in Ontario,there is less risk of such damages being awarded here.*

While $2 million of coverage (PLP) or $3 million (CDSPI) seems very high, it may not be sufficient for damages awarded in the United States. Damages awarded in malpractice actions in the U.S. can be much higher than those awarded in Canada.[6] One must also consider that damages awarded in the U.S. would be in U.S. dollars while a Canadian dentist's policy would only cover them up to their maximum in Canadian dollars. As a result, the dentist would be personally liable for any difference, thus putting your personal assets at risk.

TYPE OF TREATMENT PROVIDED

Any injury that results in death or serious bodily harm (i.e. irreversible brain damage) may result in higher damage awards. For dentists, the risk of causing death or serious bodily harm to a patient is more likely to occur as a result of complex oral surgery and/or the use of anaesthesia in any type of patient. Therefore, dentists or specialists who perform complex surgery and/or use general anaesthesia should consider carrying the maximum amount allowed under their PLP/CDSPI policy.

However, other injuries, which are not life threatening, may also result in higher damage awards. For example, not nearly as unusual or infrequent are cases of routine orthodontic care, managed between the general dentist and the orthodontist, which result in severe gingivitis/periodontitis and subsequent tooth loss. If a claim involving this type of injury was heard in the U.S., the damages awarded could be very large and both the orthodontist and the general dentist may beheld liable for damages.

PUNITIVE AND EXEMPLARY DAMAGES

The PLP policy does not cover a dentist for any damages awarded for punitive or exemplary damages. Punitive or exemplary damages are not awarded to compensate the plaintiff, but are awarded to punish the defendant if their conduct is found to be high-handed, malicious, arbitrary or highly reprehensible.[7] While there is a recent trend in Canada to award these types of damages in civil actions, they are relatively rare and are the exception and not the rule .While the PLP policy would not pay punitive damages in a lawsuit brought in Ontario, there is less risk of such damages being awarded here .However, a civil action commenced in the U.S. has a much higher risk of resulting in a judgment that includes punitive or exemplary damages.[8] Therefore, all steps should be taken to avoid a lawsuit being commenced in the U.S.

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6 Supra note 2 at 24

7 Pilot v. Whiten, [2002] 1 S.C.R. 595 at para. 94 (S.C.C.)

8 Supra note 2 at 24

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JOINT AND SEVERAL LIABILITY

A dentist who practices as part of a team of dentists/specialists in performing surgery and/or treatment on a patient should consider that in the event of an adverse treatment outcome, all dentists may be found to be liable, jointly and severally. For example, a dentist may find themselves in such a situation in the following common scenarios:

1. Canadian dentist performs implant surgery in Canada and the patient returns to the U.S. for implant prosthodontic treatment .Implants fail and patient sues both Canadian dentist who surgically placed implants and U.S. dentist who performed prosthodontic work.

2. Oral surgeon in U.S. performs orthognathic surgery and the patient sees Canadian orthodontist for full braces. Canadian orthodontist unable to correct malocclusion due to inadequate surgical correction and patient sues both U.S. oral surgeon and Canadian orthodontist.

Even if your own contribution to treatment was non-negligent, you may still be held liable for the negligence of the other dentists. Being jointly and severally liable means that all of the defendants are responsible for paying all of the damages awarded on their own. Co-defendants may later claim against each other based on their actual responsibility and liability. One must also consider the likelihood that a U.S. patient, who received part of their treatment in Canada and part of their treatment in the U.S., may, out of convenience, decide to initiate a claim against all parties in the U.S.

The general starting point in the law with regards to "joint and several liability"is that when two or more defendants act concurrently or in concert to produce a single injury, they may be held jointly and severally liable. In a case[9] involving a pediatrician who negligently treated an infant who had already suffered brain damage as a result of the negligence of the delivering obstetrician, the Court of Appeal for New York ruled that:

> *...where two parties by their separate and independent acts of negligence, cause a single, inseparable injury, each party is responsible for the entire injury: "Although they acted independently of each other,they did act at the same time in causing the damages.*

Therefore, in certain types of injuries, if it is impossible to determine who is liable for what portion of the overall injury, the court may consider all defendants to be jointly and severally liable. In the case discussed above, the jury found that the infant's brain damage was a single indivisible injury and the pediatrician was unable to provide any evidence to demonstrate that he should not be held jointly and severally liable (i.e. liable for the whole amount).

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9 Ravo v. Rogatnick, 70 N.Y. 2d 305, 514 N.E. 2d 1104, 520 N.Y.S. 2d 533 (N.Y. C.A.)

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An exception to the general rule is demonstrated in another case involving an infant who was negligently treated by a hospital and a pediatric clinic.[10] In that case, there were two separate acts, two separate allegations of malpractice and two unrelated physical injuries. This would seem to suggest that joint and several liability would not be appropriate in the circumstances. However, the court ruled that the psychological and emotional injuries were incapable of being separated and therefore, both the hospital and the clinic should be jointly and severally liable for these injuries.

Briefly, both of these cases stand for the principle that if it is too difficult for the court to a portion responsibility for an injury to the various defendants, relative to their actual responsibility and culpability, the court will act in the best interest of the plaintiff and hold all negligent defendants jointly and severally liable.

While a dentist may not be held personally liable for serious injury or death that occurs as a result of the treatment performed by another dentist or surgeon, one may be "linked" to the other treatment that is performed by other dentists by way of patient dissatisfaction with the end result. Any contributions made by a dentist who contributed to this result may be seen by an unreceptive jury to be inseparable from the treatment performed by the other practitioners. Of course, if a dentist could prove that they met the standard of care, they would not be held liable at all.

In determining whether or not to accept a patient and perform treatment as part of a team, one must balance all the relevant factors and ask oneself:

- Are you familiar with the skills and expertise of the other team members?
- Do you "trust" them?
- Is the benefit of performing the treatment worth the risk?

Even if a dentist has a signed agreement in place, this is a contract between the dentist and that patient. Therefore, there is no agreement between this dentist and the other treating dentists or surgeons. They are not bound to this agreement. As a result, this agreement does not insulate the dentist from any one of these other U.S. dentists deciding to "add" them to any lawsuit in which they find themselves involved in. Specifically, their lawyers may decide to add the Canadian dentist as a "co-defendant".

Therefore, in order to protect oneself, when a Canadian dentist treats a U.S. patient as part of a team, they should document and distinguish their treatment results from the treatment that follows. Obviously, it is especially imperative that post-treatment photographs, impressions, study models, and radiographs are obtained.

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10 Woodhouse v. Orangetown Pediatrics, P.C., 213 A.D. 2d 362, 624 N.Y.S. 2d 405 (N.Y.S.C.)

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ADDITIONAL COSTS AND INCONVENIENCE FACTOR

If a dentist is sued in the United States, they maybe compelled to personally attend for pre-trial matters (i.e. depositions) as well as for the actual trial. As a result, one could expect to incur loss of income, travel expenses and the general inconvenience of travelling to the jurisdiction in which the matter is being heard. The PLP policy would not cover an Ontario dentist for any of these additional expenses.[11] Therefore, even if the lawsuit is frivolous and without merit, they would still have to attend and pay their own additional expenses. For those dentists outside Ontario and Quebec, the CDSPI policy would reimburse them for additional expenses for up to $400 per day ($1,600 maximum per claim) if a dentist is required to attend an examination for discovery, pre-trial, trial or appeal.[12]

JURISDICTION OVER CLAIM

A U.S. patient who received treatment in Canada can elect to sue the Canadian dentist in the dentist's home province or in the United States. Even if this same patient signed an agreement consenting to bring any claim they had against a Canadian dentist in Canada, they are not precluded from attempting to convince a U.S. court that their claim should actually be heard in the United States.

In the Bulletin,[13] the PLP indicates that they would most likely protest the jurisdiction of a U.S. court over an Ontario court where the dentist is an Ontario dentist and the treatment was provided in Ontario. Ultimately, in deciding if they should retain jurisdiction, a U.S. court would consider the following factors:

- Where does the patient reside?
- Where does the dentist reside?
- Where did the injury (treatment) occur?
- Where do most of the witnesses reside?
- Did the dentist advertise his/her services in the foreign jurisdiction and/or was the patient otherwise enticed to come to Canada for treatment?
- Could the same care and treatment have been reasonably provided outside Canada in the patient's usual residence?
- Is there an agreement in place between the parties setting out whose laws should govern and which locale should have jurisdiction?

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11 Supra note 2 at 25

12 CDSPI, Malpractice Insurance Brochure, www.cdspi.com, Feb. 9, 2005

13 Supra note 2 at 25

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RECOMMENDATIONS

In order to protect yourself when treating U.S. patients, the following recommendations should be considered and implemented:

- Have U.S. patients sign an agreement (Governing Law & Jurisdiction Agreement) in which they agree to be governed by the laws of Ontario (or another Province) and agree to bring any future lawsuits in Ontario (or another Province).
- Include in this agreement a clause that makes the signing of the agreement a condition of your accepting them as a patient and performing treatment. Maximize your coverage under your PLP/CDSPI policy especially if you perform complex and/or surgical procedures or if your treatment is part of a larger, more complex treatment plan.
- Reconsider advertising policies directed at U.S. patients (including website) with regards to "enticing" U.S. patients to come to Canada for treatment.
- Document how U.S. patients are referred to your office or arrive seeking treatment.
- Contact PLP (Ontario), Ordre des Dentistes du Québec (Quebec) and CDSPI (remainder of Canada) to obtain additional information as required
- Obtain additional legal advice if the circumstances require it.

SUMMARY

All of the foregoing should not discourage any dentist from treating U.S. patients. However, Canadian dentists need to be aware of all the possibilities and potential outcomes before embarking on treatment of these same patients. In deciding to accept these patients, a Canadian dentist should consider that very few lawsuits against medical-dental professionals go to conclusion, many actions are abandoned and many fail to result in any significant damage awards for plaintiffs. However, by following the recommendations as stated above, any dentist treating U.S. patients can ensure that they have done the utmost to protect themselves, their assets and their practice.

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